SUPREME COURT, U. S.
FILED
MAR 8 1975
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1128

PETER J. PITCHESS, Sheriff of Los Angeles County,
Petitioner,

vs.

CHARLES EDWARD DAVIS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. .....

PETER J. PITCHESS, Sheriff of Los Angeles County,
Petitioner,

vs.

CHARLES EDWARD DAVIS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner, Peter J. Pitchess, Sheriff of the County of Los Angeles, State of California respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this habeas corpus action on December 9, 1974.

Opinions Below

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment (Amended Writ of Habeas Corpus) of the United States District Court for the Central District of California, appears in Appendix A to this petition. The judgment of the district court appears in Appendix B. Appendix C is a prior unpublished judgment and opinion of the Ninth Circuit, affirming a conditional

writ of habeas corpus which was initially issued by the district court. The conditional writ of habeas corpus appears in Appendix D.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on December 9, 1974. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Where the state courts have undertaken to retry a criminal defendant pursuant to a conditional writ of habeas corpus issued by a federal district judge, do the principles of state and federal comity permit the district judge to vacate its conditional writ of habeas corpus, terminate state proceedings and issue an absolute writ of habeas corpus without affording the state courts an opportunity to accord the habeas corpus petitioner full due process through state procedures of trial and appeal.

Statutory Provision Involved

28 U.S.C. §2254, in relevant part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to

the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Federal Rules Involved

Rule 60 of the Federal Rules of Civil Procedure, in relevant part:

"(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any

other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Rule 81 of the Federal Rules of Civil Procedure, in relevant part:

"(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days."

Statement of the Case

Petitioner Peter J. Pitchess seeks a writ of certiorari to have this Court review the decision of the United States Court of Appeals for the Ninth Circuit affirming the issuance of an amended writ of habeas corpus by the United States District Court for the Central District of California. The Ninth Circuit determined that the district court had authority to modify its original judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure and that respondent's effort to secure a writ of prohibition from the state appellate courts satisified the requirements of exhaustion of state remedies.

Respondent Charles Edward Davis was convicted in 1967 in the Los Angeles County Superior Court of rape, kidnapping and oral copulation and was sentenced to California state prison. On September 22, 1972, the United States District Court for the Central District of California issued a conditional writ of habeas corpus based on a finding that respondent had been denied due process at his trial through the suppression of certain laboratory analysis reports. (Appendix D.) The reports indicated that vaginal smear slides of the rape victim were negative for the presence of sperm and that semen could not be identified in the victim's panties.

The conditional writ granted the State of California the opportunity to retry respondent within 60 days from the date the judgment became final. (Appendix D.) The judgment was affirmed by the Ninth Circuit on

March 2, 1973 (Appendix C), and became final on April 2, 1973.

The State of California promptly moved to retry respondent in accordance with the terms of the conditional writ. The case was assigned for trial in the Los Angeles County Superior Court, and the laboratory report which the district court had found to have been suppressed at the first trial was made available to the defense. However, on July 3, 1973 respondent moved to dismiss the case on the new ground that the vaginal smear slides and panties of the victim were no longer available. The evidence had been available at the first trial but had not been used. The Los Angeles Police Department had destroyed the evidence as a matter of routine some time after the judgment of conviction had become final and before the conditional writ of habeas corpus had issued.

On July 9, 10, and 13, 1973, the Los Angeles County Superior Court conducted a hearing on respondent's motion to dismiss. The court considered oral testimony and documentary evidence offered by respondent and the People regarding whether scientific tests conducted on the slides and panties might have materially aided respondent in his defense. The court denied respondent's motion to dismiss, finding that the panties and slides had not been wilfully destroyed or suppressed by the prosecution, and further finding that the missing evidence would have had some value as demonstrative evidence but that it would not have materially aided respondent in his defense.

Respondent's petition for writ of prohibition was denied by the California Court of Appeal without opinion. During the pendency of respondent's petition in the state court of appeals, respondent moved the United States District Court for a modification of the conditional writ based on the destruction of the slides and panties. The district court enjoined further state proceedings pending determination of the motion for modification of the writ. The court deferred ruling on the motion pending exhaustion by respondent of state remedies. Respondent's application for writ of prohibition in the state supreme court was denied without opinion.

On January 24, 1973, the district court entered an amended, absolute writ of habeas corpus based on the ground that because of the destruction of the slides and panties, respondent could no longer be accorded a fair trial by the state courts. (Appendix B.) This judgment was affirmed by the Court of Appeals for the Ninth Circuit on December 9, 1974. (Appendix A.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

This Case Presents the Important and Unsettled Question of Whether in the Absence of Any Showing of Inadequacy of State Remedies a Federal District Judge May Interrupt a State Court's Retrial Which Has Been Undertaken Pursuant to a Previously Issued Conditional Writ of Habeas Corpus by the District Judge

Review by writ of certiorari is necessary in this case to reestablish the principle of comity between the state and federal courts and to limit the increasing unwarranted intervention by the federal courts in state judicial processes.

In this habeas corpus case the federal district judge interrupted and ultimately terminated a valid California trial proceeding without any showing of the inadequacy of the state judicial process. The state proceeding was a retrial of respondent undertaken pursuant to a conditional writ of habeas corpus issued by the district judge on the ground that the prosecution had suppressed a laboratory report at respondent's first trial. The district court ordered the state retrial proceedings suspended on the basis of a motion for modification of the writ which was filed by respondent and which alleged that relevant evidence (not the evidence which was the subject of the original writ) had been destroyed. Without indicating any reason why respondent would be prejudiced by undergoing a trial, the court ordered the state proceedings stayed pending exhaustion of state remedies by respondent through writs of prohibition in the state appellate courts.

After respondent's petitions for writs of prohibition had been denied, the district judge conducted a hearing on the materiality of the evidence which had been

destroyed, and then issued an absolute writ of habeas corpus.

Petitioner submits that the error of the United States Court of Appeals for the Ninth Circuit in affirming the judgment of the district court requires review by writ of certiorari for two important reasons:

(a) the heretofore unresolved issue of the grounds for federal intervention in state trials should be clarified to prevent intervention in the absence of a showing of inadequacy of state remedies or other extraordinary circumstances;

(b) the opinion of the Ninth Circuit that respondent exhausted state remedies by seeking writs of prohibition in the state appellate courts is inconsistent with this Court's rulings in *Ex parte Hawk*, 321 U.S. 114, 116 (1944), and *Darr v. Burford*, 339 U.S. 200, 218-19 (1950), *overruled on another ground* in *Fay v. Noia*, 372 U.S. 391 (1963).

II

A Decision of This Court Is Necessary to Clarify the Requirement That Federal Courts Afford State Courts the Opportunity to Accord Criminal Defendants Due Process Through State Procedures Before the Federal Courts Assume Habeas Corpus Jurisdiction

The basic principles of comity between the federal and state courts require that the federal courts permit the state courts to conduct their proceedings without undue interference. In *Younger v. Harris*, 401 U.S. 37, 42 (1971), this Court stated:

> "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."

In the area of federal habeas corpus for state prisoners the intent of Congress to limit the intrusion of federal courts on state proceedings is articulated in 28 U.S.C. §2254, subdivisions (b) and (c) which set forth the requirement that a state prisoner exhaust state remedies before seeking relief in federal habeas corpus. Under 28 U.S.C. §2254 federal habeas corpus is not available as a substitute for an appeal. *Fuller v. State of Florida*, 473 F.2d 1383, 1384 (5th Cir. 1973); *Frazier v. Jones*, 466 F.2d 505, 506 (5th Cir. 1972). Certainly, it is not available as a substitute for trial. *Cf. Prince v. Bailey*, 464 F.2d 544, 555 (5th Cir. 1972); *Ward v. State of Oklahoma*, 376 F.2d 847 (10th Cir. 1967).

In the present case respondent was granted federal habeas corpus relief despite the fact that he had not yet been convicted of any offense upon his retrial. After denial of his motion to dismiss on grounds of destruction of evidence, respondent was entitled to a speedy trial on the charges against him. Had he undergone trial, he might well have been acquitted of the charges and his contentions might thereby have been rendered moot. Even if respondent would have been convicted, the recourse of appeal to the California Court of Appeal and thereafter of a petition for hearing in the California Supreme Court provided a speedy and adequate state remedy. Respondent in this case pursued none of these trial and appellate remedies before seeking federal relief.

Respondent's contention in his motion to dismiss and in his applications for writ of prohibition was that if certain scientific tests could have been conducted on the slides and panties which had been destroyed, there was a possibility that the results of the test could tend

to eliminate respondent as a suspect. The trial court was not presented with any empirical evidence that such tests had ever been successfully carried out on six-year-old specimens. Accordingly, the trial court weighed the evidence produced by respondent and the prosecution and determined that respondent had failed to demonstrate by his highly speculative evidence that the slides and panties could reasonably be expected to aid him in his defense. This type of factual finding was hardly a question of general importance which the California appellate courts would wish to determine in a vacuum by writ of prohibition. *People v. Medina*, 6 Cal. 3d 484, 490-92 (1972). Such an issue would be more fairly determined in the context of all the circumstances of the trial. Since respondent was engaged in a criminal prosecution, there was every reason to permit the trial to proceed and, if necessary, to have the issue fully determined in the course of an ordinary appeal.

Nothing in the record of the instant case reveals circumstances warranting the assumption by the federal district court of jurisdiction during the pendency of the state criminal trial. Respondent never alleged that the prosecution was being carried out solely for harassment purposes without any hope of conviction. Nor did he allege any threat of irreparable injury which would be "both great and immediate." *Younger v. Harris, supra*, 401 U.S. at 46. He nowhere alleged that his state remedy of trial and appeal was inadequate. In fact, any possible injury to respondent was no more than " 'that incidental to every criminal proceeding brought lawfully and in good faith.' [Citation omitted.]" (*Id.*, at 49.)

It is apparent that the district court assumed jurisdiction in this case primarily because it had previously

issued a conditional writ of habeas corpus. Petitioner submits, however, that since the State of California fully complied with the requirements of the conditional writ and since respondent's motion for modification of the writ was based on allegations completely separate from those raised in the original petition, the pre-existence of the prior conditional writ in no manner excused respondent's failure to exhaust state remedies.

The Ninth Circuit has held that the district court properly considered respondent's motion for modification of the writ under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 81(b), however, limits the application of the Federal Rules of Civil Procedure in habeas corpus cases to areas where practice is not set out in statutes. Thus, nothing in Rule 60(b) may be read in derogation of Habeas Corpus Act which contains a specific requirement of exhaustion of state remedies. 28 U.S.C. §2254(b) and (c).

Furthermore, since 28 U.S.C. §2254(a) refers only to persons in custody pursuant to a judgment, the statute expressly requires that the habeas petitioner undergo trial before seeking federal habeas corpus. If under circumstances such as are presented here, criminal defendants may have access to a federal forum simply by filing petitions for extraordinary relief in the state appellate courts and having their petitions summarily denied, the result would be a severe disruption to local criminal process. The warning expressed by this Court in *Stefanelli v. Minard*, 342 U.S. 117, 123 (1951), regarding the dangers of the unreined use of federal equity power is appropriate to the instant case. In *Stefanelli*, the Court stated:

> ". . . If we were to sanction this intervention, we would expose every State criminal prosecution to

insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts."

III

The Ninth Circuit's Holding That Respondent Exhausted State Remedies Is Inconsistent With the Prior Decisions of This Court

The Ninth Circuit has erroneously ruled that respondent satisfied the exhaustion requirement of 28 U.S.C. §2254 by making applications for writs of prohibition in the California appellate courts.

Under California law, the denial without opinion of a petition for writ of prohibition does not constitute a decision on the merits. *People v. Medina*, 6 Cal.3d 484, 490-92, 99 Cal.Rptr. 632, 492 P.2d 686 (1972). Accordingly, such a denial does not on grounds of *res judicata* or law of the case estop the petitioner from raising the same contention on an appeal from the final judgment. Moreover, the writ of prohibition in California is an extraordinary discretionary remedy, the use of which is generally confined to questions of first impression and general importance. *People v. Me-*

dina, supra. Because the writ of prohibition is entirely discretionary and seldom granted as a pre-trial remedy, and because the denial of the writ without a written opinion does not preclude an appeal based on contentions which had been raised in the writ, the making of applications for relief by writ of prohibition as a pre-trial remedy in the state appellate courts does not constitute exhaustion of remedies.

This Court stated in *Darr v. Burford,* 339 U.S. 200, 218-19 (1950), *overruled on another ground* in *Fay v. Noia,* 372 U.S. 391 (1963),

> ". . . [t]he petitioner has the burden also of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist."

In *Ex parte Hawk,* 321 U.S. 114, 116 (1944), this Court denied petitioner's application for habeas corpus relief on the ground that he had failed to exhaust state remedies. Prior to filing for federal habeas corpus relief, petitioner in the *Hawk* case had sought habeas corpus in the Nebraska Supreme Court without first seeking relief in the lower state courts. This Court noted that the Nebraska Supreme Court did not usually entertain original petitions for habeas corpus but rather remitted petitioners' applications to an appropriate district court of the state. On the basis of petitioner's failure to avail himself of the state remedy in the Nebraska courts, this Court found that petitioner had failed to show that he had exhausted available state remedies.

Petitioner submits that because of the discretionary nature of the California writ of prohibition and the fact that it is sparingly granted as a pre-trial remedy, particularly where the speedy remedy of trial and appeal are available, respondent in this case has also failed to demonstrate exhaustion of available state remedies. *Darr v. Burford, supra.*

The ruling of the Ninth Circuit in this case is inconsistent with *Darr v. Burford, supra,* and *Ex parte Hawk,* and should be reviewed. Review is required for the further reason that the Court of Appeals opinion is not an isolated decision notwithstanding the reference in the opinion to the "unusual circumstances" of this case. In finding that respondent had exhausted his state remedies the Ninth Circuit cited *Harris v. Superior Court,* 500 F.2d 1124 (9th Cir. 1974),[1] which held contrary to *Ex parte Hawk, supra,* and *Darr v. Burford, supra,* that petitioner could exhaust state remedies by seeking a writ in the California Supreme Court unless the California Supreme Court expressly stated that its denial of the petition was based on petitioner's failure first to seek review in the lower state courts.

Petitioner submits that in light of the holdings of the Ninth Circuit in both *Harris v. Superior Court* and the instant case, the present disregard of the requirements of exhaustion of state remedies is likely to recur unless corrected by this Court.

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[1]A Petition for Writ of Certiorari is presently pending in this Court.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

Memorandum

In the United States Court of Appeals, for the Ninth Circuit.

Charles Edward Davis, Petitioner, Appellee, v. Peter J. Pitchess, Sheriff of Los Angeles County, Respondent, Appellant. No. 74-1809.

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS and ELY, Circuit Judges, and BALDWIN*

Filed: Dec. 9, 1974.

The District Court originally granted a conditional writ of habeas corpus, having found that Davis had been deprived of a fair trial by the failure of the prosecution to disclose a laboratory report containing potentially exculpatory evidence. After this Court affirmed that decision in an unreported opinion, the State commenced preparation for a retrial. It was then discovered that certain physical evidence which was the subject of the laboratory report and which all had assumed was still in existence had been destroyed during the course of a routine disposal of old evidence. The State nonetheless proceeded to press the prosecution, and the State trial court denied Davis either a dismissal of the charges or a stay of proceedings while he proceeded in the State appellate courts.

Davis then moved the District Court to modify the conditional writ and make it absolute, contending that the destruction of the physical evidence made it impossible for him to conduct certain sophisticated scientific tests which potentially could have established that he

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*Honorable Phillip B. Baldwin, Associate Judge, United States Court of Customs and Patent Appeals, sitting by designation.

was not the perpetrator of the crime with which he was charged. The District Court first stayed the State trial until the California Court of Appeals and ultimately the California Supreme Court acted upon Davis' applications for a writ of prohibition. Following the denial of the applications by those courts, the District Court found that the destruction of the physical evidence made it impossible for Davis to receive a fair trial. It therefore modified the writ and made it absolute.

The District Court had jurisdiction to set aside its original judgment. The motion to modify can be considered under the circumstances a motion under F.R. Civ.P. 60(b)(6). It is clear that if the full circumstances had been presented to the District Court in the first instance, the original writ would have been absolute. It was not necessary for the District Court to seek leave of this Court to entertain the motion simply because of the affirmance on appeal, for the motion raised a matter not within the scope of the mandate of this Court. *See* 7 Moore, *Federal Practice* 426.

Davis' effort to secure a writ of prohibition from the State appellate courts was, under these unusual circumstances, sufficient to meet any exhaustion requirement. The federal claim was squarely presented in those applications. *See Picard v. Connor*, 404 U.S. 270, 275 (1971); *and see Harris v. Superior Court*, ... F.2d .... (9th Cir. 1974).

Affirmed.

Chambers, Circuit Judge, concurring:

While I concur in the foregoing opinion, I do believe it would have been better practice to have let the State's second trial go through to a conclusion before ordering the writ to issue.

APPENDIX B

Amended Writ of Habeas Corpus

United States District Court, Central District of California.

Charles Edward Davis, Petitioner, v. Peter J. Pitchess, Sheriff of Los Angeles County, Respondent. Civil No. 71-2288-F.

Filed: Jan. 23, 1974.

The motion to modify the Conditional Writ of Habeas Corpus previously issued in this case having been heard and considered, and it having been determined by this court that, for the reasons set forth in its Opinion and Order of January 9, 1974, any reprosecution of the petitioner by the State of California would be in violation of the United States Constitution, it is

Ordered that the Conditional Writ of Habeas Corpus filed September 22, 1972, which reads,

> "ORDERED that Peter J. Pitchess, Sheriff of Los Angeles County, or whosoever may have custody of the body of Charles Edward Davis, shall discharge the petitioner, Charles Edward Davis, from custody insofar as he is held in custody by nature of his conviction in Case No. A220869, unless the State of California shall institute proceedings to retry petitioner within 60 days from the date this conditional writ becomes final."

is amended to read as follows:

> "IT IS ORDERED, ADJUDGED AND DECREED:
>
> 1. Peter J. Pitchess, Sheriff of Los Angeles County, California, or whosoever may have custody of Charles Edward Davis, shall discharge Charles Edward Davis from custody insofar as he

is held in custody by nature of his conviction in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles.

2. Charles Edward Davis is released and discharged from any and all restraints which may have been imposed upon him by reason of his conviction in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles.

3. Pursuant to the provisions of 28 U.S.C. § 2251 all proceedings which have been taken or which may hereafter be taken against Charles Edward Davis in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles are stayed.

4. Any and all proceedings taken against Charles Edward Davis in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles are void.

5. The court retains jurisdiction over this habeas corpus proceeding for all purposes."

IT IS FURTHER ORDERED that the clerk of this court shall serve by United States mail copies of this Amended Writ of Habeas Corpus upon the petitioner, his counsel, the Attorney General of the State of California, the District Attorney for the County of Los Angeles, and the Clerk of the Superior Court of the State of California for the County of Los Angeles.

January 23, 1974.

/s/ Warren J. Ferguson
Warren J. Ferguson
United States District Judge

APPENDIX C

Memorandum of Affirmance

United States Court of Appeals, for the Ninth Circuit.

Charles Edward Davis, *Petitioner and Appellee,* vs. Peter J. Pitchess, Sheriff of Los Angeles County, *Respondent and Appellant.* No. 72-2850.

[March 2, 1973].

Appeal from the United States District Court for the Central District of California

Before: TRASK and GOODWIN, Circuit Judges, and EAST,* District Judge

The trial court entered a conditional writ of habeas corpus in favor of Davis, the Petitioner-Appellee (ordering a timely new trial or release from custody). The Appellant Sheriff appeals and we affirm.

We find that the specific findings of fact entered by the trial court are clearly supported by the pre-trial statement of facts agreed to by the parties, and further that the trial court did not mechanically adopt Davis' prepared findings of fact and conclusions of law as condemned by *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339-40 (9th Cir. 1970).

Accordingly, we conclude that

(a) The substance of the Analyzed Evidence Report, prepared during the course of police investigation, contained evidence of an exculpatory nature and material to Davis' defense; and

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

(b) That Davis was denied a fair trial upon the state charges in that, notwithstanding his adequate request therefor, knowledge of the existence of the report and its substance was wrongfully, either wilfully or through inexcusable neglect, withheld from Davis prior to verdict. *Brady v. Maryland*, 373 U.S. 83, pp. 87-8.

Conditional writ of habeas corpus affirmed.

Dated this 26th day of February, 1973.

APPENDIX D

Conditional Writ of Habeas Corpus

In the United States District Court, Central District of California.

Charles Edward Davis, Petitioner, vs. Peter J. Pitchess, Sheriff of Los Angeles County, Respondent. Civil No. 71-2288-F(T).

Filed: Sept. 22, 1972.

The petition for a Writ of Habeas Corpus on behalf of Charles Edward Davis having come on to be heard before this Court on the 28th day of August, 1972, and after hearing Richard Wasserstrom, attorney for the petitioner in support of the petition, and Lawrence Scherb, Deputy Attorney General for the State of California in opposition, and upon consideration of the petition for the Writ of Habeas Corpus, the briefs in support of the petition, the return by way of answer, and the papers and exhibits filed herein, it is:

ORDERED that Peter J. Pitchess, Sheriff of Los Angeles County, or whosoever may have custody of the body of Charles Edward Davis, shall discharge the petitioner, Charles Edward Davis, from custody insofar as he is held in custody by nature of his conviction in Case No. A220869, unless the State of California shall institute proceedings to retry petitioner within 60 days from the date this conditional writ becomes final.

September 22, 1972.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

SUPREME COURT OF THE UNITED STATES

PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY *v.* CHARLES EDWARD DAVIS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1128. Decided May 19, 1975

PER CURIAM.

Respondent Davis was convicted in 1967 in the Superior Court of Los Angeles County of rape, kidnapping, and oral copulation; he was sentenced to state prison. On direct appeal in the California courts, respondent argued, *inter alia*, that the failure of the state prosecutor in his case to turn over to him an exculpatory laboratory report, despite his request for all material reports, violated his Fourteenth Amendment right to a fair trial under our decision in *Brady* v. *Maryland*, 373 U. S. 83 (1963). The laboratory report stated that scientific tests by police officials failed to reveal the presence of sperm on either vaginal smear slides taken from the victim after the rape or clothing worn by the victim at the time of the rape. State courts rejected this contention on direct appeal.

Respondent twice unsuccessfully pursued this contention in petitions for habeas corpus filed under 28 U. S. C. § 2254 in the United States District Court for the Central District of California. In 1972 a third habeas corpus petition in that court proved more successful, and the District Court ruled that the failure of the prosecutor to supply respondent with the laboratory report denied him a fair trial under *Brady*, *supra*. The court issued a conditional writ of habeas corpus which provided that habeas corpus would issue, compelling the petitioner to release respondent from custody, unless California provided respondent with the laboratory report and moved

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to retry him within 60 days. This judgment was affirmed by the United States Court of Appeals for the Ninth Circuit.[1]

California moved to retry respondent in accordance with the terms of the conditional writ, and the case was set for trial in state court. The laboratory report forming the basis of respondent's *Brady* claim was turned over to him. In a discovery motion made in advance of trial, respondent requested the State to make the vaginal smear slides and clothing worn by the victim at the time of the rape available to him. Although this physical evidence had been available at respondent's prior trial, it was destroyed as a matter of police routine sometime during the six years between the time respondent's conviction became final and issuance of the conditional writ of habeas corpus.

Respondent then moved in state court to dismiss the charges against him on the grounds that the routine destruction of this physical evidence constituted an incurable suppression of exculpatory evidence in violation of *Brady* which deprived him of any opportunity, present or future, to a fair trial. After a hearing the state trial court denied respondent's motion, finding that the physical evidence had not been willfully suppressed and further finding that it would not have materially aided respondent's defense.

Respondent then filed an application for a writ of prohibition in the California Court of Appeal. During the pendency of this application, he also filed a motion in the United States District Court seeking to "modify" its prior conditional writ of habeas corpus and replace it

[1] The opinions of state courts on respondent's direct appeal and of the District Court and Court of Appeals in the original habeas proceedings and subsequent modification proceedings are unpublished. Neither the events of respondent's original *Brady* claim relating to suppression of the laboratory report nor the merits of respondent's later claim relating to the unavailability of the [illegible] are before us.

with an order granting an absolute writ and enjoining any retrial on the pending state charges. The basis for this motion was the destruction of the clothing and slides. The District Court temporarily enjoined the pending retrial[2] but deferred ruling on respondent's motion.

The California Court of Appeal and the California Supreme Court denied respondent's applications for writs of prohibition without opinion. The District Court then, without permitting the trial to proceed in the state court, conducted a hearing of its own. The court held that destruction of the slides and clothing violated *Brady*, *supra*. In the opinion of the court the destruction of this evidence precluded certain additional scientific testing which might possibly have established that respondent was not the perpetrator of the crime; and since this defect was incurable, the court found that respondent could never receive a fair trial on the charges. Respondent's motion was granted.[3] The United States Court of

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[2] In view of our disposition of this case, we have no occasion to consider the application of our decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), to these facts.

[3] The amended order of the District Court provided:

"IT IS ORDERED, ADJUDGED AND DECREED:

"1. Peter J. Pitchess, Sheriff of Los Angeles County, California, or whosoever may have custody of Charles Edward Davis, shall discharge Charles Edward Davis from custody insofar as he is held in custody by nature of his conviction in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles.

"2. Charles Edward Davis is released and discharged from any and all restraints which may have been imposed upon him by reason of his conviction in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles.

"3. Pursuant to the provisions of 28 U. S. C. § 2251 all proceedings which have been taken or which may hereafter be taken against Charles Edward Davis in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles are stayed.

"4. Any and all proceedings taken against Charles Edward Davis

Appeals for the Ninth Circuit affirmed, and petitioner sought certiorari here from that judgment.

Habeas corpus jurisdiction of persons in custody pursuant to the judgment of a state court is conferred on federal courts by 28 U. S. C. § 2254. That statute requires exhaustion of available state remedies as a precondition to consideration of a federal habeas corpus petition:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

See, *e. g.*, *Nelson* v. *George*, 399 U. S. 224, 229 (1970); *Irvin* v. *Dowd*, 359 U. S. 394, 404–405 (1959); *Ex parte Royall*, 117 U. S. 241 (1886).

In the instant case, the unavailability of the physical evidence sought by respondent in connection with his retrial was never raised until he filed his pretrial motion in state court to dismiss the charges.[1] The issue was

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in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles are void.

"5. The court retains jurisdiction over this habeas corpus proceeding for all purposes."

[1] The failure to raise a claim relating to the unavailability of the physical evidence for purposes of retrial on either direct appeal or in the original federal habeas proceedings will not stem from any lack of diligence on respondent's part. Since the physical evidence

neither raised in nor considered by state courts during the course of his direct appeal from the first conviction or by the federal courts during the proceedings resulting in issuance of the conditional writ of habeas corpus. And respondent does not contest that, should he be convicted upon retrial, full appellate review in state courts will be available on whatever contentions he choses to raise concerning the nonavailability of the physical evidence now sought.

Under our decision in *Picard* v. *Connor*, 404 U. S. 270 (1971), exhaustion of state remedies is required as a prerequisite to consideration of each claim sought to be presented in federal habeas:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' *Ex parte Royall*, *supra*, at 251, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in state courts and another in the federal courts." *Id.*, at 275–276.

While recognizing the exhaustion requirement for invoking federal habeas relief, the Court of Appeals found that § 2254 did not preclude consideration of the additional contention raised in respondent's motion to amend the District Court's original conditional order for two reasons.

First, the Court of Appeals felt that respondent's effort to secure a writ of prohibition from the state appellate courts on the grounds of destruction of the physical evidence constituted a sufficient exhaustion of state remedies under these circumstances.

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was available at the original trial, it appears unlikely that respondent could have discovered its unavailability in advance of preparations for retrial.

Both the California Court of Appeal and the California Supreme Court denied the applications without opinion. In California it is well established that a writ of prohibition is an extraordinary writ, whose use for pretrial review is normally limited to "questions of first impression and general importance." *People* v. *Medina*, 6 Cal. 3d 484, 489, 492 P. 2d 686, 690 (1972) (en banc). The denial of an application for writ of prohibition does not constitute, and cannot be fairly read as, an adjudication on the merits of the claim presented. Inclusion of an asserted point of error in a denied pretrial application for writ of prohibition does not bar raising the same points on post-trial direct appeal. *Ibid.*

In *Ex parte Hawk*, 321 U. S. 114, 116 (1944), we held that denial of an application for an extraordinary writ by state appellate courts did not serve to exhaust state remedies where the denial could not be fairly taken as an adjudication of the merits of claims presented, and where normal state channels for review were available. In the instant case, denial by state appellate courts of respondent's applications cannot be fairly taken to be an adjudication of the merits of his claim and full post-trial appellate review is available if respondent is convicted. On these facts, the denial of respondent's applications did not serve to exhaust his available state remedies.

The second reason advanced by the Court of Appeal was that the exhaustion requirement is inapplicable to the new contention raised in respondent's motion, since the motion was authorized under Fed. Rule Civ. Proc. 60 (b)(6) as a motion for relief from a final order. It reasoned that since the District Court would have granted an absolute writ if it had been presented with the destruction of the physical evidence at the time of issuance of the conditional writ, the District Court was justified under this rule in amending its prior judgment to make the writ absolute.

Rule 60 (b) provides in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment . . . for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

The rule does not by its terms speak to the requirement of exhaustion of remedies as a prerequisite for federal habeas relief. The exhaustion requirement, *Picard* v. *Connor*, *supra*, at 276, is statutorily incorporated in 28 U. S. C. §§ 2254 (b) and (c), and Fed. Rule Civ. Proc. 81 (a)(2) provides:

> "These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in the statutes of the United States. . . ."

Since the exhaustion requirement is statutorily codified, even if Rule 60 (b) could be read to apply to this situation it could not alter the statutory command. The second reason advanced by the Court of Appeals is not persuasive, therefore, unless it was correct in its reasoning on the issue of exhaustion. We believe for the reasons previously stated that it was incorrect in its treatment of the exhaustion issue.

Respondent failed to exhaust available state remedies on the claim which formed the basis for the unconditional writ, and he is entitled to no relief based upon a claim with respect to which state remedies have not been exhausted. Neither Rule 60 (b), § 2254 of Title 28, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court. Cf. *Stefanelli* v. *Minard*, 342 U. S. 117 (1951).

The motion of the respondent for leave to proceed *in*

forma pauperis and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to vacate the orders which it entered subsequent to the order granting a conditional writ of habeas corpus.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.